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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2004 APR 22 A 9 04

April 22, 2004

AGENDA ITEM

For Meeting of: 04-29-04

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

James A. Kahl *JK*
Deputy General Counsel

Rosemary C. Smith *RC*
Associate General Counsel

Mai Dinh *MD*
Acting Assistant General Counsel

Margaret Perl *MP*
Staff Attorney

Subject: Draft AO 2004-08

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 29, 2004.

Attachment

1 ADVISORY OPINION 2004-08
2
3
4

5 Paul G. Borron, III, Esq.
6 Borron & Delahaye
7 58065 Meriam Street
8 Post Office Drawer 679
9 Plaquemine, LA 70765-0679
10

DRAFT

11 Dear Mr. Borron:

12 This responds to your letters dated February 6, 19, and 23 and April 1 and 13, 2004,
13 on behalf of the American Sugar Cane League ("ASCL") requesting an advisory opinion
14 concerning the application of the Federal Election Campaign Act of 1971, as amended ("the
15 Act"), and Commission regulations to ASCL's proposed granting of a severance benefits
16 package to a former employee who recently resigned his position in order to become a
17 Federal candidate.

18 ***Background***

19 ASCL is a Louisiana non-profit corporation representing Louisiana sugar cane
20 growers and processors. ASCL currently employs five people. Your request indicates that
21 on February 20, 2004, ASCL's President and General Manager, Charles Melancon,¹
22 resigned in order to become a candidate for the U.S. House of Representatives. You state
23 that Mr. Melancon had been in that position for approximately 11 years at the time of his
24 resignation. ASCL proposes a severance package for Mr. Melancon of full salary for a

¹ Your request does not refer to this former employee by name, however an open letter posted on the ASCL website and public media sources have stated that Charles Melancon, former President and General Manager of ASCL, announced his intention to run as a candidate for the U.S. House of Representatives for the 3rd District in Louisiana. Mr. Melancon filed his Statement of Candidacy and his Statement of Organization with the Commission on February 25, 2004.

1 period of six months to one year with the continuation of his health insurance coverage for
2 that period.

3 You state that ASCL began the practice of offering severance benefits in 1987.
4 ASCL has no written policy regarding severance packages for former employees, and no
5 formula for the calculation of the benefits to be granted. ASCL does not have a written
6 employee handbook and none of its employees, including Mr. Melancon, has a written
7 employment agreement. You state that the factors considered in deciding whether to grant
8 a severance package to a former employee, and the size of such benefit, are: (1) the position
9 held, (2) the length of time employed, and (3) an evaluation of job performance.

10 Since 1987, you explain that only 7 employees have terminated employment with
11 ASCL. Of those 7 former employees, 4 were granted severance packages. You state that
12 each of the former employees granted a severance package was either discharged for cause
13 or resigned in lieu of being discharged for cause. You emphasize that Mr. Melancon's
14 resignation is voluntary and not the result of any cause for termination.

15 The content of these past severance packages vary: a Vice President and General
16 Manager with 15 years tenure and an Information Director with 14 years of service both
17 received 3 months pay (at the annual rate of \$72,000 and \$40,000, respectively) without
18 any continuation of benefits; a former secretary employed for 10 years received 6 months
19 pay at the annual rate of \$25,000 without any continuation of benefits; and most recently in
20 2001, an employee with a total of 24 years of service, including 16 years as Vice President
21 and Director of Research, received a much more extensive severance package including one
22 year full pay (\$88,690) with one year of health benefits coverage, his company owned

1 computer, the option of purchasing his company owned car for "Blue Book" value, and
2 ASCL paid for his previously scheduled speaking engagement trip to Australia.

3 You state that only three other employees have left ASCL since 1987. These three
4 former employees did not receive a severance package of any kind. One former employee
5 retired at age 66 and received retirement benefits from ASCL. The other two employees
6 were each employed for less than one year. You state that one of these two employees, a
7 Vice President and General Manager for 11 months, was discharged for cause, but you do
8 not state the circumstances surrounding the departure of the third employee who did not
9 receive a severance benefit.

10 You also explain that the 2001 termination of the former Vice President and
11 Director of Research caused serious controversy and divisiveness within the ASCL,
12 including the refusal of some members to pay their dues in protest of the action. At that
13 time, Mr. Melancon, who had proposed the termination, discussed with a select number of
14 Board members the option of resigning from his position as President. These individual
15 Board members discouraged Mr. Melancon from resigning, but did promise to propose to
16 the Board that he receive a severance package comparable to that granted to the terminated
17 Vice President if Mr. Melancon chose to resign. You state that the persons who were
18 prepared to propose Mr. Melancon's severance package in 2001 were either officers of the
19 corporation or held significant committee chairmanships. However, Mr. Melancon did not
20 submit his resignation in 2001, and the issue of a possible severance package was not raised
21 with the full Board. The Commission has also received comments from board members,
22 including the Chairman and the Secretary of the Board at that time, describing these events

1 in 2001. You state that the Board would have mostly likely voted favorably if presented
2 with this severance package proposal sponsored by these past Board members in 2001.

3 You state that the severance package now proposed by ASCL (six months to one
4 year's salary with health benefits) is the same package that these individual board members
5 agreed to propose had Mr. Melancon resigned in 2001. The comments of past and present
6 Board members state that the severance package is a continuation of these earlier
7 discussions and the scope of the package is not related to what Mr. Melancon might do after
8 resignation from ASCL.

9 ***Question Presented***

10 May ASCL provide its former President and General Manager severance pay and
11 health insurance benefits for six months to a year without violating the Act's prohibition on
12 contributions by corporations?

13 ***Legal Analysis and Conclusions***

14 Yes, ASCL may provide the proposed severance package without violating the
15 Act's ban on corporate contributions to candidates.

16 ASCL is an incorporated entity and is therefore prohibited from making any
17 "contribution or expenditure" in connection with a Federal election. 2 U.S.C. 441b(a); 11
18 CFR 114.2(b)(1). The term "contribution" is defined in the Act to include "any gift, loan,
19 advance, or deposit of money or anything of value made by any person for the purpose of
20 influencing any election for Federal office." 2 U.S.C. 431(8)(A). Thus, ASCL may only
21 provide Mr. Melancon with the proposed severance package if it does not constitute a
22 contribution under the Act or Commission regulations.

23 The Act also prohibits the conversion of campaign funds to any "personal use."

1 2 U.S.C. 439a. Under the Commission regulations implementing this section of the Act, a
2 third party's payment of a candidate's expenses that would otherwise be deemed "personal
3 use" expenses under 439a(b)(2) is considered a contribution by the third party unless the
4 payment would have been made "irrespective of the candidacy." 11 CFR 113.1(g)(6). The
5 regulations further provide that certain types of employment-related compensation are
6 considered to be payments made "irrespective of the candidacy."

7 (iii) Payments for that expense were made by the person making the payment before
8 the candidate became a candidate. Payments that are compensation shall be
9 considered contributions unless –

10 (A) The compensation results from *bona fide* employment that is genuinely
11 independent of the candidacy;

12 (B) The compensation is exclusively in consideration of services provided by
13 the employee as a part of this employment; and

14 (C) The compensation does not exceed the amount of compensation which
15 would be paid to any other similarly qualified person for the same work
16 over the same period of time.

17 11 CFR 113.1(g)(6)(iii). If ASCL's proposed severance package satisfies the three criteria
18 in 11 CFR 113.1(g)(6)(iii)(A), (B), and (C), the payments would not be considered
19 contributions pursuant to this section, and ASCL would, thus, not be deemed to have made
20 a corporate contribution.

21 Under these regulations, any severance package provided to Mr. Melancon must
22 first be tied exclusively to services provided by him as a part of his *bona fide* employment.

23 11 CFR 113.1(g)(6)(iii)(A) and (B). The history of the ASCL severance program fairly

1 demonstrates that since 1987, ASCL has a regular business practice of providing severance
2 packages to departing long-term executives and employees. According to your information
3 regarding former ASCL employees, 4 out of the 7 former employees who have terminated
4 employment with ASCL since the severance policy was instituted in 1987 received some
5 type of severance package. ASCL's stated factors used in deciding whether to offer a
6 severance package include relatively objective considerations, such as "job performance,"
7 position, and length of service. ASCL has a sufficient corporate record of providing
8 severance packages to departing employees that the Commission concludes that the
9 payment of a severance package to Mr. Melancon would be tied exclusively to services
10 rendered in his bona fide employment with ASCL. 11 CFR 113.1(g)(6)(iii)(A) and (B).

11 Under the third prong of the "irrespective of the candidacy test," ASCL must
12 demonstrate that the severance benefits package offered to Mr. Melancon "does not exceed
13 the amount of compensation which would be paid to any other similarly qualified person
14 for the same work over the same period of time" as required by 11 CFR 113.1(g)(6)(iii)(C).
15 Certain board members in 2001, and the full board in 2004, considered the tenure and
16 service of Mr. Melancon and deemed that his employment with ASCL was most
17 comparable to the most recently departed executive, the former Vice-President with 24
18 years of service who received one-year pay with benefits. The fact that Mr. Melancon was
19 not offered the full range of fringe benefits accorded to the former Vice-President is
20 reflective of his shorter 11-year tenure with the organization. Thus, the current proposed
21 severance package is proportionate with the past severance packages offered by the ASCL.

22 Given the nature of organizations as small as ASCL, the lack of a written severance
23 policy and the existence of some Board discretion in determining the size and scope of a

severance package are not fatal to the conclusion that the proposed severance package is compensation "irrespective of the candidacy." In Advisory Opinion 2000-1, the Commission determined that a proposal for partial paid leave would not be considered compensation "irrespective of the candidacy" because the decision to grant a request for partial paid leave was "solely in the discretion of the firm" and based on factors not exclusively tied to services provided by the employee, including the nature of the proposed outside activity, and its benefit to the firm overall. In contrast, ASCL's determination of whether or not to offer severance benefits, although discretionary in part, focuses on factors related solely to the employee's services at ASCL (length of service, position, job performance). Moreover, the fact that a severance package of similar size to the current proposal was discussed with influential board members in 2001 when there was no prospect of Mr. Melancon's future status as a Federal candidate is additional evidence that ASCL's proposed package is compensation "irrespective of the candidacy."

Because the severance package is sufficiently tied to past employment services by Mr. Melancon and is reasonably construed as comparable to the compensation that would be offered to a similarly qualified ASCL executive, the proposed severance package meets the requirements of 11 CFR 113.1(g)(6)(iii). Thus, the provision of this package would not be a prohibited corporate contribution under the Act and the Commissions regulations.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion

1 presented in this advisory opinion, then the requestor may not rely on that conclusion as
2 support for its proposed activity.

3

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Sincerely,

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8

Bradley A. Smith
Chairman

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10

11 Enclosure (AO 2000-1)

